

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 30, 2008

IN RE ADOPTION OF C.B.F.

**Appeal from the Chancery Court for Knox County
No. 15248 Michael W. Moyers, Chancellor**

No. E2007-02279-COA-R3-PT - FILED APRIL 30, 2008

This is a parental rights termination case. The Petitioners, the mother of the child at issue and the mother's husband, brought a petition to terminate the biological father's parental rights on the ground of abandonment. We hold that the evidence in the record supports, clearly and convincingly, the trial court's dual findings of (1) willful abandonment by the biological father and (2) that it was in the child's best interest to terminate father's parental rights. Accordingly, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

R. Dwight Foster, Oak Ridge, Tennessee, for the appellant, J.K.F.

James R. LaFevor, Knoxville, Tennessee, for the appellees, J.P.L. and M.J.L.

Dennis B. Francis, Knoxville, Tennessee, guardian *ad litem*.

OPINION

I.

On November 12, 1999, C.B.F. ("the child") was born to J.K.F. ("Father") and M.J.L. ("Mother"). Father and Mother were divorced in 2003. Pursuant to the judgment of divorce, primary physical custody of the child was awarded to Mother. Father was given regular visitation time and ordered to pay child support of \$385 per month; additionally, Father was directed to assist in the cost of medical insurance and to pay one-half of any medical bills not covered by insurance.

On March 23, 2006, Mother and J.P.L. (“Husband”) (collectively “Petitioners”), filed a petition for adoption and for termination of Father’s parental rights, based on Father’s willful failure to support or to make reasonable payments toward the support of the child. They also petitioned the trial court to legally change the surname of the child from Father’s surname to Husband’s.

According to Petitioners, they began contemplating this action after an October 23, 2005, incident involving Father. Petitioners claim that on that date, the odor of marijuana was emanating from the child when Petitioners picked the child up from visitation at Father’s home. Petitioners took the child to Children’s Hospital, where the child’s exposure to marijuana was confirmed by the hospital staff. The appropriate authorities were notified. On October 25, 2005, a search warrant was served at Father’s home, at which time the Knox County Sheriff’s Department found a “sophisticated, for-profit [marijuana] operation that [Father] was running at that house . . .” An investigator testified that weapons and a substantial quantity of drugs were seized during the search. Subsequently, in August 2006, Father was convicted and incarcerated for drug-related charges stemming from the October 2005 incident. He was released on probation in February 2007.

In the petition for termination, Petitioners asserted that Father has failed to fulfill his financial obligations despite having the financial means to do so. According to Petitioners, Father operated his own house-washing business averaging one house per week at a net profit of approximately \$200 to \$215 per house. They claimed that Father also worked at a variety of jobs, including ones utilizing his electronics training, where he earned \$12 to \$14 per hour. Petitioners further asserted that Father also was employed on a fairly regular basis at a series of restaurants, making an average of \$10 per hour including tips. They contended, however, that the only regular support payments made for the child occurred through wage assignments taken against Father’s income.

At the time of the August 30, 2007, trial on the termination petition, the evidence revealed that Father had made one payment towards child support in 2007, one payment of \$50 in 2006, 5 payments in 2005, two payments in 2004, and 10 payments in 2003. The guardian *ad litem* filed a report reflecting that Father owed \$14,000 in back child support. Father, in his trial court testimony, admitted that during the relevant period he spent at least \$100 per week on marijuana and an unknown amount on methadone.

On September 4, 2007, in a “Memorandum Opinion and Order,” the trial court terminated the parental rights of Father. This appeal followed.

II.

The relevant¹ issues presented by Father on appeal are as follows:

¹Father presented a third issue – “whether the Court erred in disallowing testimony from mother in relation to rehabilitation.” He does not argue this issue and the transcript of the evidence clearly reflects that the trial court did not “disallow[] testimony from Mother in relation to rehabilitation.” It never happened.

1. Whether the evidence presented at trial was sufficient to warrant a finding that the child's alleged abandonment constituted willful abandonment on the part of Father.
2. Whether there was clear and convincing evidence presented at trial to warrant a finding that termination was in the child's best interest.

III.

Our Supreme Court has clearly delineated the standard of review for cases involving termination of parental rights:

[T]his Court's duty, . . . , is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

Trial courts, unlike appellate courts, are able to observe witnesses as they testify and to assess their demeanor. Thus, trial courts are in a unique position to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). Accordingly, appellate courts will not re-evaluate a trial court's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999), *Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315-16 (Tenn. 1987).

The United States Supreme Court has long held that parents have a fundamental right to the care, custody, and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995); *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." *In re M.J.B.*, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." *Means v. Ashby*, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003) (quoting Tenn. Code Ann. § 36-1-113(l)(l)). "Few consequences of judicial action are so grave as the severance of natural family ties." *M.L.B. v. S.L.J.*, 519 U.S. 102, 119, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)).

While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. *See Blair v. Badenhope*, 77 S.W.3d 137, 141 (Tenn. 2002). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. *In re Drinnon*, 776 S.W.2d at 97. Tenn. Code Ann. § 36-1-113 (Supp. 2007) governs termination of parental rights in

this state. A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) [t]hat termination of the parent's or guardian's rights is in the best interests of the child." Tenn. Code Ann. § 36-1-113(c). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights. *In re C.W.W.*, 37 S.W.3d 467, 473 (Tenn. Ct. App. 2000).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. *Id.* at 474; *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, *State v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., filed August 13, 2003), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re S.M.*, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); *In re J.J.C.*, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

IV.

A.

The grounds for termination of parental rights are listed in Tenn. Code Ann. § 36-1-113(g). The ground alleged in this particular case is abandonment. Tenn. Code Ann. § 36-1-113(g)(1). The statute provides that the initiation of an action to terminate parental rights may be based upon the ground of "abandonment" as further defined at Tenn. Code Ann. § 36-1-102 (2005). Tenn. Code Ann. § 36-1-102 provides as follows:

(1)(A) For purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, "abandonment" means that:

(i) For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child[] . . .

Tenn. Code Ann. § 36-1-102(1)(A)(i). For purposes of subdivision (1), "willfully failed to support" or "willfully failed to make reasonable payments toward such child's support" means "the willful

failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child[] . . .” Tenn. Code Ann. § 36-1-102(1)(D). “Token support” means that “under the circumstances of the individual case,” the support is “insignificant given the parent’s means.” Tenn. Code Ann. § 36-1-102(1)(B). A parent’s failure to support his or her child because he or she is financially unable to do so, however, does not constitute a willful failure to support. *E.g.*, ***O’Daniel***, 905 S.W.2d at 188; ***In re Adoption of Kleshinski***, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *18 (Tenn. Ct. App. M.S., filed May 4, 2005). Also, simply proving that a parent did not support a child is not sufficient to carry this burden. ***In re M.J.B.***, 140 S.W.3d at 655. “Willful” failure to support a child occurs when a person is aware of his or her duty to support, has the capacity to do so, makes no attempt to do so, and has no justifiable excuse for not doing so. *Id.* at 654. In ***In re C.M.C.***, No. E2005-00328-COA-R3-PT, 2005 WL 1827855, at *6 (Tenn. Ct. App. W.S., filed August 3, 2005), this court held as follows:

The element of willfulness is essential to the court’s determination of abandonment. *See In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). Although willfulness in the context of the statutes governing the termination of parental rights does not require a finding of malice or ill will, it does require clear and convincing evidence of choice of action, free from coercion, made by a free agent. *In re Adoption of Kleshinski*, No. M2004-00986-COA-R3-CV, 2005 WL 1046796, at *18 (Tenn. Ct. App. May 4, 2005) (no perm. app. filed) (citations omitted). . . .

Furthermore, in ***In re Adoption of T.A.M.***, No. M2003-022247-COA-R3-PT, 2004 WL 1085228, at *4 (Tenn. Ct. App. M.S., filed May 12, 2004), this court opined that

[t]he willfulness of particular conduct depends upon the actor’s intent. Intent is seldom capable of direct proof, and triers-of-fact lack the ability to peer into a person’s mind to assess intentions or motivations. *American Cable Corp. v. ACI Mgmt., Inc.*, No. M1997-00280-COA-R3-CV, 2000 WL 1291265, at * 4 (Tenn. Ct. App. September 14, 2000) (No Tenn. R. App. P. 11 application filed). Accordingly, triers-of-fact must infer intent from the circumstantial evidence, including a person’s actions or conduct. *See Johnson City v. Wolfe*, 103 Tenn. 277, 282, 52 S.W. 991, 992 (1899); *Absar v. Jones*, 833 S.W.2d 86, 89-90 (Tenn. Ct. App. 1992); *State v. Washington*, 658 S.W.2d 144, 146 (Tenn. Crim. App. 1983); *see also In re K.L.C.*, 9 S.W.3d 768, 773 (Mo. Ct. App. 2000). . . .

The requirement that the failure to support be “willful” is both a statutory and a constitutional requirement. *See In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999).

The crucial period for review is the four months preceding the filing of the petition for termination of Father's parental rights. Tenn. Code Ann. § 36-1-102(1)(A). Petitioners maintain that the abandonment which serves as a basis for termination under Tenn. Code Ann. § 36-1-113 was demonstrated by Father's failure to provide more than token child support for his son between November 23, 2005 and March 23, 2006 (when the petition to terminate was filed). During that time frame, Father made two payments of \$50 for child support. During the same four months, Father owed \$385 per month in child support, for a total of \$1,540 for the entire period.

Father argues that his failure to provide support to his son resulted in large part from his inability to secure employment in Knoxville in the field for which he had been educated and trained. Father also claims that he failed to make scheduled payments because of his incarcerations, the difficulty faced by a convicted felon in securing gainful employment, a fire at his residence, and his admitted addiction to marijuana. Father additionally asserts that it is improper for the court to speculate as to whether he would have voluntarily paid his child support obligations if he had received his tax refund directly; an involuntary payment of support was made as a result of a tax refund interception pursuant to state law. *See* Tenn. Code Ann. § 71-3-124 (2004).

Petitioners correctly observe that Father's incarceration did not occur until August 2006, after the relevant four-month period at issue in this case. They note, as reflected in the record, that even after the filing of the petition to terminate, Father made only one payment of \$50 and that by wage assignment on June 12, 2006. According to Mother's testimony, once a wage assignment would go into effect, Father would quit his job or move to another position, forcing Child Support Services to file multiple wage assignments. According to Petitioners, the evidence clearly reveals that Father spent his earnings on drugs rather than child support. We agree with this assessment of the evidence.

On the issue of abandonment, the trial court held as follows:

The statutory definition of "abandonment" includes a willful failure to provide adequate support for the child. TCA §36-1-102(1)(A)(i). This Court finds that this ground for termination has been proven by clear and convincing evidence. During this period, [Father] made only token payments for support of this child, although he had the education and work background to do far more. The evidence indicated that [Father] was in fact working, either in traditional employment or in a self-employed position, and was in fact earning income. The evidence shows that during the period in which [Father] was failing to make his court ordered child support payments for the support of the child in question, he was making payments for the support of another of his minor children. The evidence indicated that those payments which [Father] did make in support of this child were made only on advice of counsel during the period in which he was awaiting trial on drug charges. Furthermore, to the extent that [Father] claims he was unable to make sufficient income during this

period to support this child, the Court finds that his inability was due to [Father]'s heavy recreational use of illegal narcotics. This Court finds such activity to be "willful," and that it will not serve as a basis for [Father]'s complaint that he had insufficient income to pay his court ordered child support. The Court finds that at the time the petition for termination was filed, [Father] was \$9,000.00 in arrears in his child support obligation, and that by the date of the termination hearing, [Father] was in arrears in excess of \$14,000.00.

For the foregoing reasons, this Court finds that clear and convincing evidence has been shown to support a finding of willful abandonment of the child in question by [Father] during the statutorily relevant four months preceding the filing of the termination petition. The Court specifically finds that [Father] willfully failed to pay more than a token level of support for this child, although he had the ability to do so, and that his willing failure to make any serious efforts toward support of the child evidence an intent on the part of [Father] to abandon this child.

The record reveals clear and convincing evidence that during the relevant four-month period, Father was able to support his son financially. The evidence is also clear and convincing that Father voluntarily and consciously decided not to support his son. Accordingly, we find no error in the trial court's decision that a ground for termination exists in this case.

B.

In Tennessee, the following factors are some of those to be considered in determining whether it is in the best interest of a child to terminate a parent's rights:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

Father contends that the trial court cannot terminate a biological father's parental rights by simply saying that a child might have a better or more affluent upbringing with another. He observes that while the trial court noted that Father is making substantial progress in turning his life around, the trial court's findings and conclusions seem to rely solely on Father's past behavior. Father asserts that testimony was presented at trial that he is in the process of getting his life back in order, is employed, is and has been verifiably drug-free since his release from custody, and is in compliance with the terms of his probation and in "good standing" with his probation officer. Father claims that he maintains a home, has local family support, and has made more consistent and more substantial child support payments since his release from state custody and the obtaining of employment. Father places great significance on the fact that the guardian *ad litem*, who testified that it was his position "that not only is it in the best interest of my client that the parental relationship be terminated, but

it is manifest to do so in this case,” did not attempt to visit or communicate with Father to determine his current circumstances.

Father further relies on our holding in *Marsh v. Sensabaugh*, No. W2001-00016-COA-R3-JV, 2001 WL 1176017, at *5 (Tenn. Ct. App. W.S., filed October 1, 2001), where this court stated that “[w]hile a parent who has a present drug or alcohol abuse problem may be unfit to care for a child, past substance abuse problems do not directly reflect the parent’s attitudes, sense of responsibility and dedication toward raising a child.”

In the case before us, as relates to the best interest of the child analysis, the trial court found as follows:

In this case, [Father] testified passionately that he has turned his life around since his experience in prison, and testimony from his probation officer and family members seems to support that contention. However, several factors weigh heavily against [Father]. . . . [Father] lives in a one bedroom apartment. His income as an employee at a restaurant is moderate at best. Although he appears to be managing his life better now than in the past, [Father] has a long history of trouble with the law. Since his release from incarceration, even during the pendency of this termination proceeding, the Petitioners testified that [Father] has made only one child support payment in the amount of \$1,155.00, and the testimony indicated that the monies used to make that payment were the proceeds of a loan from his family. . . . [Father] is financially liable for the support of three other minor children apart from the child that is the subject of this proceeding. It seems very unlikely to this Court that [Father] will be in a position for the foreseeable future, if ever, to provide meaningful support for this child. The evidence that [Father] and this child have a “meaningful relationship” is scant at best; the child has been in the physical custody of his mother since birth, [Father] has not seen the child for nearly 2 years since his arrest, and the evidence indicates that the child has come to think of Petitioner [J.P.L.] as his father.

On the other hand, the Petitioners maintain a wholesome and healthy home environment in which the child is thriving. The combined income of the Petitioners is more than sufficient to provide for the material well-being of [this] child. It was clear to the Court that Petitioner [J.P.L.] has great affection for this child and is sincere in his desire to create a permanent legal familial relationship with the child in question. Although the Court was impressed and moved by the desire of [Father] to maintain a relationship with this child, it is

not the duty of this Court to consider the desires and interests of the parent; the inquiry must be made regarding the best interest of the minor child. The Guardian ad litem's position based on his interviews and investigation into this matter was that it was clearly in the best interest of the child in question that the parental rights of [Father] be terminated and the child be adopted by Petitioner [J.P.L.]. After weighing the totality of the evidence and in consideration of the statutory factors set forth at TCA § 36-1-113, the Court finds itself in agreement with that conclusion. The Court finds that clear and convincing evidence has been adduced by the Petitioners that supports a finding that termination of [Father]'s parental rights with regard to the child in question is in the best interest of the child. The Court does not enter into this decision lightly and it is the sincerest hope of this Court that [Father] will continue with his rehabilitation and will focus not only on building a new responsible and productive life for himself, but upon developing and maintaining a healthy and nurturing relationship with his other three children.

* * *

The evidence does not preponderate against the trial court's finding of clear and convincing proof that termination is in the child's best interest.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, J.K.F. The case is remanded to the trial court for enforcement of the court's judgment and for collection of costs assessed below, all pursuant to applicable law.

CHARLES D. SUSANO, JR., JUDGE